BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH DURSTELER, Claimant, v. BASIC AMERICAN FOODS, INC., Employer, and LUMBERMEN'S MUTUAL CASUALTY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 99-021419** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: April 25, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on January 26, 2005. Paul T. Curtis of Idaho Falls represented Claimant. Eric S. Bailey of Boise represented Employer/Surety (BAF). Paul B. Rippel of Idaho Falls represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted oral and documentary evidence. The record was left open for taking post-hearing depositions and the parties submitted

post-hearing briefs.[1] The matter came under advisement on January 13, 2006 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided were:

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury or cause;

2. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

3. Whether Claimant is entitled to permanent partial impairment (PPI) and the extent thereof;

4. Whether Claimant is entitled to permanent total disability (PTD) in excess of permanent impairment, and the extent thereof;

5. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

6. Whether ISIF is liable under Idaho Code §72-332; and

7. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Subsequent to the hearing, it became apparent that there was no dispute that Claimant is totally and permanently disabled. Thus, issue 1 and issues 3-5 became moot. The parties do not agree as to the liability of ISIF and apportionment of Claimant's disability between BAF and ISIF. Claimant's position is that he is entitled to permanent and total disability benefits; so long

[1] It should be noted that the last post-hearing deposition was not completed until August 3, 2005, more than six months after the hearing. Thereafter, the parties asked for several briefing extensions.

as he receives his benefits, it matters little to him who pays them.

BAF asserts that Claimant had significant impairment and disabilities that were manifest and a hindrance to his employment prior to his 1999 injury with BAF. BAF contends that 80% of Claimant's disability pre-existed the 1999 accident, thus placing most of the responsibility for payment of benefits on ISIF.

ISIF asserts that the doctrine of collateral estoppel precludes Claimant's claim against ISIF. Even if Claimant is not estopped from asserting his claim against ISIF, the claim fails because pre-existing conditions did not "combine with" his subsequent injuries to cause his total disability, relieving ISIF of liability pursuant to Idaho Code § 72-332.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Mitzie Dursteler, Brad Parkinson, Richard Livermore, and Joseph Milligan taken at hearing;

2. Joint exhibits 1 through 20;

3. Claimant's exhibits 21 through 28;

4. Post-hearing depositions of Henry George West, Jr., D.C. (with exhibits), Barbara K. Nelson, M.S., CRC (with exhibits), Nancy J. Collins, Ph.D. (with exhibit), Douglas R. Crum, CDMS (with exhibits), and Richard Knoebel, M.D. (with exhibits).[2]

All objections interposed in the depositions of Barbara Nelson, Nancy Collins, and Douglas Crum are overruled. Defendant's objection to the admission of page 2 of Exhibit 4 to Dr. Knoebel's deposition is granted (see ftn. 2). All objections interposed during the deposition of Dr. West are overruled with the exception of the objection stated at page 44, line 25, which is

[2] Page 2 of Exhibit 4 to Dr. Knobel's deposition includes information developed post-hearing and is excluded pursuant to timely objection by Defendants.

sustained. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 62 years of age. He resided in Shelley, Idaho with his wife of 38 years.

2. Claimant attended, but did not graduate from high school, leaving after he completed the ninth grade. He was an average student. In the early 1970s, Claimant attended a vocational-technical school in Idaho Falls where he learned welding. In the early 1980s, Claimant earned his GED.

WORK HISTORY TO NOVEMBER 23, 1997

3. Claimant worked doing welding and fabrication for about fifteen years, then worked as an automotive service technician for another dozen years before he began working as a maintenance mechanic. In 1990, Claimant went to work for Pillsbury at its Shelley potato processing facility. He repaired and maintained all types of equipment used to process and package dehydrated potato products. The job was physically demanding, requiring lifting of 75 to 100 pounds on occasion. The job also required that Claimant sit, walk, stand, climb, crawl, bend, reach, work overhead, and push and pull. Claimant worked a demanding shift schedule that included regular overtime. Claimant was a reliable and valued employee.

PRE-EXISTING CONDITIONS AND RESTRICTIONS

4. Claimant has a significant long-standing hearing loss. He does not recall not having a hearing deficit. Claimant describes his hearing loss as "an 80 percent loss in one ear and a 60 percent loss in the other ear." Tr., p. 39. Claimant also has a long history of respiratory

complaints, including chronic sinusitis, asthma, and chronic obstructive pulmonary disease (COPD). Claimant saw a physician in 1997 regarding knee complaints, but did not follow up. None of these conditions were industrial in nature.

5. Claimant has a history of low back complaints dating back to at least 1992. Lumbar x-rays in December of that year showed "[l]umbar rotoscoliosis with associated degenerative changes. No evidence of acute bony trauma." Ex. 4, p. 58.

6. In March 1997, Claimant saw Donald R. Bjornson, M.D., complaining of low back pain that started in early January. As evidenced by his chart note of March 20, 1997, Dr. Bjornson was nonplussed by Claimant's complaint:

> He's had low back pain which he said started sometime the early part of January. In actual fact he had trouble before, in fact had x-rays in 1992 of his low back. Films at that time showed degenerative arthrosis of most of the lumbar spine. Got additional films today including bending films and he has had progression of the amount of disc degeneration that extends from L1 to the sacrum. Most prominently at L5-S1 and L3-4 with a lot of spurring and degenerative scoliosis. This was present before, is worse now. . . . Symptoms seem pretty much under control with minimal medications. He's using Tylenol and I don't believe he wants to get involved in a therapy program. He said he's used a [brace] in the past and it didn't help him. His history without question goes back further than three months even though he said he didn't know why he wasn't having trouble before but he had trouble enough to be using a brace at one time and had x-rays at least five years ago.

Id., at p. 59. Dr. Bjornson did not believe that Claimant was a surgical candidate, advised him to continue with the Tylenol, stay active, and return if his condition worsened.

7. On November 23, 1997, Claimant was using a sledgehammer to knock a shaft out of a gearbox at the Pillsbury plant in Shelley when he hurt his right arm. Claimant was diagnosed with a ruptured bicep tendon, which was surgically repaired by Rheim Jones, M.D. As Claimant began to recover from the bicep tendon surgery, he continued to complain about his right arm and shoulder. He was eventually diagnosed with a torn rotator cuff, which Dr. Jones

repaired surgically. Dr. Jones released Claimant to return to work with permanent restrictions on May 20, 1998. Restrictions were "10 pound weight restriction at shoulder height or above, and no repetitive motion at shoulder height or above. Ladders are OK." Ex. 17, p. 354. Dr. Jones determined Claimant was at maximum medical improvement (MMI) on July 10, 1998 and gave him a rating of "7% permanent physical impairment of the upper extremity or 4% of the whole person." *Id.,* at p. 343.

8. In December 1998, at the request of Employer/Surety, Claimant underwent an independent medical exam (IME) by Dr. Knoebel. The IME was limited to the injuries to Claimant's right upper extremity. Dr. Knoebel agreed with Dr. Jones' 4% whole person PPI. He also opined as to reasonable permanent restrictions:

> The patient currently has the ability to do medium level work with 50 pounds maximum lifting occasionally, 25 pounds frequently below shoulder level. The patient's right shoulder problems result in restrictions of no repetitive or frequent reaching at or above shoulder level and no forceful work above shoulder level. Reasonably, 10 pounds maximum lifting at or above shoulder level is maximum.

Dr. Knoebel Depo., Ex. 2, p. 10.

CLAIMANT'S WORK FOLLOWING 1997 ACCIDENT

9. When Claimant was released to return to work for Pillsbury in July 1998, he had permanent restrictions as outlined in Findings 7 and 8, above. While Claimant's job title did not change, his duties did change. In an attempt to accommodate his restrictions, Pillsbury placed Claimant on a straight day schedule with no nights, weekends or overtime. He worked with another maintenance mechanic in the waste area of the plant. Claimant performed the same types of work that he had done in his original position with Pillsbury but without as much of the heavy work. He also learned how to use his left arm for many tasks. Despite Employer's best efforts, Claimant performed much work that was outside his restrictions.

10. While Claimant was still on modified duty to accommodate his right upper extremity restrictions, Pillsbury sold the Shelley plant to BAF. The change in ownership and management occurred in January 1999. As part of the sale, BAF took on Pillsbury's employees. Claimant was still working in a modified position in the waste area of the plant for BAF when he had his second industrial accident.

MARCH 31, 1999 ACCIDENT

11. Claimant and his co-worker were replacing a windsock when Claimant fell at least six feet from a ladder to the ground. He injured his left shoulder, left elbow, and his low back in the fall. Claimant finished his regular shift on the date of injury.

MEDICAL CARE FOLLOWING 1999 ACCIDENT

12. Claimant sought medical care the day after the accident. X-rays of Claimant's lumbosacral spine and left elbow were taken.

> Lumbosacral Spine: There is a rotatory dextroscoliosis. There is marginal vertebral osteophyte formation at all levels. There is degenerative disc disease at L3-4 and L5-S1. The disc spaces are normal. There is hypertrophic degenerative facet disease at L4-5 and L5-S1. No obvious fracture.
>
> Left Elbow: A three view exam was done. The alignment at the joint is anatomic. No obvious joint effusion. There is no fracture. The bones are normal.

Ex. 12, p. 198. Claimant was taken off work for a few days and referred to Eric D. Walker, M.D.

13. Dr. Walker saw Claimant on April 5. He diagnosed a lumbosacral strain injury without neurologic involvement, left elbow contusion injury with left lateral epicondylitis, and left shoulder contusion with possible post-traumatic bursitis with impingement. Dr. Walker kept Claimant off work until April 8, and placed the following restrictions on Claimant as a result of his left upper extremity injuries:

- No overhead work with left upper extremity; and

- No lifting over 25 pounds on the left.

Dr. Walker imposed the following restrictions on Claimant as a result of his lumbosacral strain:

- No repetitive bending or twisting or lifting activities;
- No climbing ladders;
- No prolonged sitting or standing without breaks.

Dr. Walker noted that these restrictions constituted "very sedentary work," and questioned whether Employer had such work available but noted that Claimant should work toward a return to work on April 8.

14. When Claimant returned to Dr. Walker on April 8, he was complaining of some symptoms radiating into his right leg. An MRI was ordered, and Dr. Walker continued Claimant's release from work. On April 13, Claimant saw Dr. Walker to review the MRI. The MRI showed multi-level degenerative changes and degenerative disc disease at virtually all levels. Dr. Walker did note one particular finding:

> There does, however, appear to be asymmetric disc protrusion at L4-5 to the right with some encroachment into the neuroforamin. There is also some neuroforaminal narrowing at L5-S1 bilaterally due to hypertrophic spurring of the joints. On my review of this in conjunction with the patient, I believe that the L4-5 level is the only area where there is any significant lateralization or change which would appear more acute in nature. The study is difficult to interpret to some degree due to the significant scoliosis which is present.

Ex. 3, p. 211. Dr. Walker continued Claimant's release from work, continued his physical therapy, and prescribed a back brace.

15. Claimant returned to Dr. Walker on April 20. Independent observation corroborated that Claimant had difficulty getting in and out of his car and had an antalgic gait. Dr. Walker was concerned about Claimant's pain behaviors and resistance to returning to work in the absence of any hard neurological findings consistent with his complaints. Nevertheless,

and in light of the apparent L4-5 asymmetric bulge, Dr. Walker was willing to entertain the possibility that Claimant did sustain some injury to his low back in the March 31 fall. Dr. Walker also noted that the shoulder and elbow complaints were still present, but secondary to the low back. Dr. Walker recommended Claimant return to light-duty work for two hours per day the first week, four hours per day the second week, continuing to increase the hours per day weekly until he returned to full-time work. Restrictions included:

- Walking to and from the worksite only;
- No lifting greater than 10 pounds;
- *Ad-lib* position changes with not more than fifteen minutes in any position.

16. Claimant returned to Dr. Walker on April 29 and again on May 5, this time angry, complaining, and without an appointment. While Dr. Walker believed that Claimant had some legitimate pain complaints, the chart note expressed concerns of symptom magnification and exaggerated reports of Claimant's use of pain medication. Claimant adamantly refused to consider an epidural steroid injection. Dr. Walker suggested that electrodiagnostic testing of the right lower extremity might help determine whether there were actual neural deficits consistent with the L4-5 disc bulge. Electrodiagnostic testing was done the same day and the results were normal. Dr. Walker concluded:

> Significant multi-level degenerative changes in the lumbar spine which are pre-existing in nature. Cannot exclude, however, that the L4-5 disc still could be a "pain generator" with some asymmetric protrusion to the right side.

Ex. 13, p. 221. Dr. Walker believed that Claimant could continue to work at light duty on the schedule that had been previously discussed. He also suggested that a functional capacity evaluation (FCE) might help determine Claimant's objective limitations.

17. Claimant participated in an FCE on May 10 and 11, 1999. The therapist opined

that Claimant gave maximum consistent effort, but had concerns about the validity of the second day's tests in light of Claimant's apparently over-medicated condition. Once again, the amount of pain medication that Claimant claimed to be using did not jibe with the amounts that Dr. Walker prescribed.

18. Relevant observations from the FCE include a correlation between heart rate and pain behavior, with Claimant's heart rate increasing when he reported increased pain. The therapist concluded that Claimant had significant deficits, which he believed were the result of Claimant's long-standing orthopedic problems and not the result of the March 31 accident. He opined that Claimant was able to do sedentary to light work and could not return to his time of injury position as a maintenance mechanic.

19. Claimant returned to Dr. Walker following the FCE. Dr. Walker wanted a second opinion from Dr. Blair before declaring Claimant at MMI. As to causation, he stated:

> As I have outlined before, I am unable to state with 100% surety that the disc changes are all pre-existing, but I believe it *more probable than not* that this is the case.

Ex. 13, p. 222. Emphasis added.

20. Claimant saw Benjamin Blair, M.D., on May 24 for a second opinion. Dr. Blair determined that while Claimant remained symptomatic, he was at MMI. The doctor opined that Claimant was capable of performing sedentary to light work for an eight-hour day and forty-hour week. Dr. Blair determined that Claimant fell within the DRE lumbosacral category II of the *AMA Guides to the Evaluation of Permanent Impairment*, 4th ed. (*AMA Guides*, 4th ed.), giving him a 5% whole person impairment rating. Dr. Blair opined that 80% of Claimant's impairment pre-existed his fall and 20% was attributable to the fall. Thus, 1% of the PPI was apportioned to the fall, and 4% was found to be pre-existing. Restrictions pertaining to Claimant's low back

included *ad-lib* positional changes and limits on walking, standing, bending, stooping, lifting, squatting or crouching.

POST-ACCIDENT EMPLOYMENT

21. Claimant continued to work in a sedentary capacity, increasing his work hours until he was working eight hours per day. About the time that Claimant had worked up to eight-hour workdays, he was given permanent restrictions that precluded his return to a maintenance mechanic position. Employer could not permanently accommodate Claimant's restrictions and he was let go in June 1999. Claimant has not worked since his separation from BAF.

POST-EMPLOYMENT MEDICAL RECORDS

22. Dr. Wheeler. Claimant saw Ronald D. Wheeler, M.D., in September 1999 for an orthopedic evaluation of his back, left shoulder and left elbow. Dr. Wheeler did not dispute either the determination by Drs. Walker and Jones that Claimant was at MMI, or their impairment rating or its apportionment.

23. Dr. Jones. In November 1999, Claimant returned to see Dr. Jones, complaining of a painful left shoulder and elbow since the March accident. Ultimately, Dr. Jones diagnosed a rotator cuff tear, which he attributed to the March 31, 1999 fall. Dr. Jones performed a surgical repair of the left shoulder on March 28, 2000. On May 31, Dr. Jones determined Claimant had reached MMI from the rotator cuff repair. Dr. Jones found no permanent impairment following repair, so did not rate the left shoulder.

24. Gail Fields, M.D. In March 2002, Claimant underwent an arthroscopic medial meniscectomy of his left knee. This was a non-industrial injury and Claimant made a full recovery.

25. Dr. Clark. Edwin M. Clark, M.D., evaluated Claimant in December 2002. First, Dr. Clark opined that Claimant "was rushed through an impairment rating, and was pushed out of the system within six weeks time without appropriate treatment." Ex. 3, p. 053. He also found it odd that Dr. Jones awarded Claimant no PPI for the left shoulder repair, especially since Dr. Jones awarded 4% whole person impairment for the right shoulder injury. Dr. Clark opined that according to the *AMA Guides,* 5th ed., Claimant was entitled to a 1% whole person rating on the left shoulder because of limited internal rotation. Finally, Dr. Clark rated Claimant's lumbar spine impairment. Using the *AMA Guides,* 5th ed., Dr. Clark determined that Claimant was in a DRE lumbar category II, which provides for impairment of 5% to 8% of the whole person. Dr. Clark assumed the maximum impairment of 8%. Regarding apportionment, Dr. Clark reasoned:

> . . . recognizing the fact that the patient was asymptomatic prior to the injury, doing his usual and customary duties and not on medications or treating, apportionment factor would then be 50% due to the industrial injury and 50% due to the preexisting degenerative lumbar disease.

Id. This resulted in 4% whole person PPI for Claimant's low back attributable to the March 1999 accident.

26. Dr. West. In December 2004, two years after Dr. Clark's evaluation of Claimant, and four years, nine months after the March 1999 accident, Claimant saw Henry G. West, D.C., for an evaluation of injuries arising from the 1999 accident. Dr. West rated Claimant with 24% whole person PPI which included 21% for his spine, 2% for his left upper extremity, and 1% for his right upper extremity. Dr. West apportioned the 24% PPI as 75% pre-existing and 25% a permanent aggravation of his pre-existing condition. This resulted in a 6% whole person PPI. In his deposition, Dr. West conceded that he may have erred when he included the left shoulder impairment in the apportionment, as there was no evidence that it was pre-existing.

27. Dr. Knoebel. In January 2005, Dr. Knoebel was asked to review the medical records of Claimant. In pertinent part, Dr. Knoebel disagreed with Dr. West's PPI rating regarding Claimant's upper extremity injuries. He noted that Claimant had already been rated for the right shoulder, and the March 1999 accident did not increase the right shoulder impairment. As to the left shoulder, Dr. Knoebel believed that the 2% PPI rating for the left rotator cuff repair should not have been apportioned as it related entirely to the March 1999 accident. Dr. Knoebel also disputed Dr. West's PPI rating for Claimant's lumbar spine. While he agreed that the March 1999 accident resulted in a permanent aggravation of Claimant's long-standing and symptomatic low back pain, Dr. Knoebel disagreed with Dr. West's methodology in calculating both components of the 21% whole person impairment related to Claimant's spinal impairment. Dr. Knoebel agreed with Dr. Blair's 5% PPI for Claimant's low back, of which 1% was attributable to the March 1999 industrial accident.

VOCATIONAL EVIDENCE

28. Although the fact of Claimant's total and permanent disability is not in issue, the timing of its onset is at issue. Three different vocational experts had the opportunity to weigh in on Claimant's disability status and when it occurred.

29. Barbara Nelson. Claimant contracted with Barbara Nelson to prepare an analysis of Claimant's employability following the March 1999 injury. After a thorough review of Claimant's medical, work, and social history, Ms. Nelson opined in her February 2005 report that *prior* to his March 1999 accident, Claimant had restrictions and had lost access to some portion of the job market but was still employable in "*light* to *medium* jobs that did not involve much overhead work, such as small engine repair work, certain manufacturing jobs, agricultural sorting jobs, certain production jobs, and some lighter janitorial jobs." Nelson Depo., Ex. 3, p.

13. Emphasis added. In her deposition she opined:

> A. It's my opinion that [Claimant] is totally and permanently disabled due to the combination of his impairments and the nonmedical factors of his case.
> Q. In arriving at that opinion, did you consider both medical and nonmedical factors?
> A. I did.
> Q. And what are the medical factors that you considered?
> A. Medical factors include his low-back impairment, his bilateral shoulder impairment, his hearing loss, his knee condition, his left elbow condition, his chronic sinusitis, and asthma. That's all.
> Q. And what nonmedical factors did you consider?
> A. His age, his limited education, his limited transferable skills for work that he can now physically perform.

Nelson Depo, p. 11.

30. Douglas N. Crum. Employer/Surety contracted with Douglas Crum to prepare an analysis of Claimant's disability resulting from his 1999 industrial injuries. Mr. Crum's report is dated November 2004. The gist of Mr. Crum's analysis is that Claimant sustained no disability in excess of his impairment as a result of the 1999 accident. Mr. Crum reasoned that the restrictions imposed as a result of his 1997 right shoulder injury precluded Claimant from performing the duties of his job of maintenance mechanic and many of the mechanical or fabricating jobs that he had previously held. The restrictions imposed as a result of the 1997 accident subsumed any restrictions that resulted from the 1999 accident, so that the later accident had no significant effect on Claimant's physical capacities.

31. Mr. Crum was deposed in June 2005 and at that time was of the opinion that Claimant was totally and permanently disabled as a result of his lifting restrictions and the necessity for *ad-lib* positional changes. In his deposition, Mr. Crum opined that the apportionment of Claimant's disability to pre-existing conditions offered by Drs. West, Blair, and Knoebel (20-25% resulting from the 1999 accident and 75-80% pre-existing), were reasonable. However, as to when Claimant became disabled, he maintained his position that it

was the 1997 accident together with Claimant's then-pre-existing conditions that caused his total and permanent disability:

> Q. [By Mr. Curtis] . . . are you just saying it was totally related to the '97 plus the preexisting that caused him to be a total perm and the '99 accident had nothing to do with it?
> A. It appears to me that that's the case. That the '97 injury and the preexisting caused the total perm disability.

Crum Depo., p. 39.

32. Nancy Collins. ISIF retained Nancy Collins to prepare a vocational assessment regarding Claimant's employability and vocational disability resulting from his March 1999 accident. Dr. Collins' report, dated January 2005, concluded that Claimant was significantly disabled as a result of his 1999 back injury, and lacked earning capacity because of his need for *ad-lib* positional changes. She opined that the lifting restrictions relating to the right shoulder were significant, but did not contribute to Claimant's disability "as he is taken out of the labor market by the back injury alone." Dr. Collins Depo., Ex. A, p. 8. Dr. Collins took exception to Mr. Crum's opinion that the 1999 accident had no effect on Claimant's disability, stating:

> I understand that [Claimant] had minor back pain and objective degeneration prior to the 1999 injury, but he did not lose work because of back pain, and he did not have limitations from his physicians. It appears the 1999 injury permanently aggravated this back condition to the point that he was unable to return to work.

Id. Dr. Collins' deposition testimony was consistent with her report, and she reiterated that it was the back injuries that took Claimant out of the job market.

DISCUSSION AND FURTHER FINDINGS

33. The agreement of the parties that Claimant is totally and permanently disabled moots many of the issues identified at the outset of this proceeding. In particular, issues concerning pre-existing conditions and apportionment of those conditions pursuant to Idaho Code § 72-406, and determination of PPI and PPD are no longer at issue.

34. Medical Care. Claimant raised the issue of entitlement to medical care, but since this is an accepted claim, entitlement to reasonably necessary medical care is statutory pursuant to Idaho Code § 72-432. The only evidence presented regarding medical care was the testimony of Claimant at hearing that he estimated there was approximately $500.00 in outstanding medical bills related to the 1999 accident. No documentary evidence was presented to allow the Referee to determine the existence or extent of outstanding medical costs. To the extent that Claimant can provide reliable documentation, consisting of either current unpaid invoices from providers or proof that Claimant has paid providers for services related to his March 1999 accident, BAF shall either pay or reimburse those costs. The Commission declines to address future medical care, as the need for such care is speculative at this time.

ISIF LIABILITY

Collateral Estoppel

35. ISIF contends that Claimant is precluded from even bringing a claim against ISIF because he entered into an agreement with Pillsbury and its surety for lump sum settlement (LSS) of his 1997 injury that contained the following language:

> After attorney fees and costs, Claimant will receive $17,803.03 which also includes settlement of Claimant's claim for loss of future wage earning ability and claim for total and permanent disability. This lump sum settlement represents 105 periodic monthly payments of $169.95 from the date of the alleged injury until Claimant reaches 65 years of age for purposes of computing any worker's [sic] compensation offset in the event Claimant becomes entitled to Title II Social Security disability benefits.

Ex. 20, p. 452. ISIF argues that because the phrase "total and permanent disability" appears in the LSS agreement that was ultimately approved by the Commission, Claimant cannot assert in this proceeding that he was *not* totally and permanently disabled at the time of the LSS. ISIF cites to *Jackman v. State, Indus. Special Indem. Fund*, 129 Idaho 689, 931 P.2d. 1207 (1997) in

support of its argument. *Jackman* and its progeny, *Clark v. Truss*, ___ Idaho ____, 128 P.3d 941 (2006) are inapposite on the facts of this case. Both *Jackman* and *Clark* concerned the PPI ratings that had been associated with the breakout of benefits in prior LSS agreements, and whether the Claimant was bound by those ratings in a later, adjudicated proceeding.

Leaving aside the substantive issue of whether, in fact, a Commission approval of a settlement agreement is tantamount to a final judgment in a litigated case,[3] the language in the LSS agreement at issue in this proceeding can hardly be characterized as an assertion that Claimant was totally and permanently disabled as a result of his 1997 accident. Rather, the language in the LSS agreement merely acknowledges that in exchange for valuable consideration Claimant is relinquishing all future benefits to which he might otherwise be entitled as a result of the 1997 injury that was the subject of the settlement. Such benefits might have included medical care or additional impairment or disability, including permanent total disability. Waiving the possibility of a future claim of total permanent disability is poles apart from a binding assertion that Claimant was totally permanently disabled at the time he entered into the LSS agreement.

Idaho Code § 72-332

36. Idaho Code § 72-332(1) provides that if an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the preexisting impairment and the subsequent injury suffers total and permanent disability, the

[3] The Court in *Jackman* reiterated the five-part test for determining whether collateral estoppel or issue preclusion bars a claim. All of the tests relate to the *litigated* case that concludes with a *final judgment*. These tests are inapplicable in an administrative proceeding that is compromised by settlement rather than being litigated or adjudicated. While the Commission's approval of the LSS agreements may amount to a final disposition of the proceeding, such approval does not constitute a judgment in a fully adjudicated case.

employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set out the four conditions that must be met in order to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a preexisting impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance; and

(4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317. Because BAF impleaded ISIF, it bears the burden of proving ISIF liability.

37. There is no dispute between BAF and ISIF that Claimant had a pre-existing impairment (the right arm and shoulder injuries) and that the impairment was manifest (Claimant had permanent restrictions on lifting and working overhead). ISIF takes the position that BAF has failed to prove the two remaining elements required for ISIF liability: ISIF contends that Claimant's pre-existing impairments were either not serious enough to constitute a hindrance or obstacle to his obtaining employment, or they did not combine with his subsequent injuries to cause his total permanent disability.

Subjective Hindrance

38. The test for determining whether a pre-existing impairment constitutes a subjective hindrance or obstacle to employment is set out in *Archer v. Bonners Ferry Datsun,* 117 Idaho 166, 786 P.2d 557 (1990). A finding of subjective hindrance does not turn solely on a

claimant's attitude about a pre-existing condition. As noted by the Court in *Archer*, if that were the case, the requirement would be meaningless in the case of both the hypochondriacal claimant and the hero claimant. Instead, the Court stated:

> . . . evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the claimant's employability will all be admissible.

117 Idaho at 172, 786 P.2d at 563.

39. In the case at bar, Claimant had a number of conditions that pre-existed his 1999 injury, including degenerative disease of his lumbar spine, significant hearing loss, chronic sinusitis, asthma, bad knees, and restrictions on his right upper extremity. The record as a whole indicates that Claimant's chronic sinusitis, asthma, and bad knees did not constitute singly or together, a subjective hindrance to employment. Likewise, the degenerative condition of his low back could not be said to constitute a subjective hindrance. Prior to the 1999 accident, it did not preclude any of his chosen activities. He received no regular treatment, and used only the occasional over-the-counter Tylenol for pain relief. While Claimant's low back appeared from all objective medical imaging to be a ticking bomb, it is the nature of such bombs that their presence is not noticeable until they detonate, in Claimant's case, when he fell from the ladder in 1999.

40. The same cannot be said of his hearing loss or his right upper extremity injuries. While Claimant's hearing impairment was not industrial in nature, and had never been rated, it did constitute a subjective hindrance to employment. Claimant may not have viewed it as an obstacle, and in fact it may not have been an obstacle in his time-of-injury-position or similar

positions within his occupational title.[4] However, once Claimant was limited to sedentary to light work with *ad-lib* positional changes, the hearing impairment became a very real obstacle to Claimant's employability.

41. Similarly, the right upper extremity impairment was an obstacle to employment because of the lifting and overhead work limitations. All three vocational experts concur that prior to his 1997 accident, Claimant had performed medium to heavy work. The restrictions resulting from his 1997 accident precluded him from doing heavy work. In fact, Claimant never returned to his pre-1997 injury position. All three vocational experts agreed that Claimant had lost access to a portion of the job market as a result of his 1997 injuries and the subsequent lifting restrictions.

42. Applying the test for determining whether an impairment is a hindrance or obstacle set out in *Archer* leads to the conclusion that Claimant's pre-existing hearing and right upper extremity impairments were a subjective hindrance to his obtaining employment.

Combined Effects

43. To satisfy the "combined effects" requirement in I.C. § 72-332(1), it must be shown that *but for* the preexisting impairments, the claimant would not have been totally permanently disabled. *Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added). Although the "combined effects" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most of the litigated cases have involved two common scenarios: 1) where the claimant was already totally and permanently disabled as an odd-lot worker prior to the most recent industrial injury; and 2) where the claimant became totally and permanently disabled solely as a result of the most recent industrial injury. The Court

[4] Claimant had hearing aids in the past that he refused to wear. He was not open to trying more recently developed aids.

has carefully laid out a framework for analyzing these two fact patterns and determined that the "combined effects" requirement has not been met in either situation.

44. While BAF asserts that most of Claimant's disability resulted from the 1997 accident, the record just does not support such a position, Mr. Crum's opinion notwithstanding. Neither does the record support ISIF's assertion that Claimant was totally and permanently disabled by the 1999 accident alone.

45. If one considers only Claimant's rated industrial impairments, then it is arguable that his total permanent disability could be assigned to the 1999 accident alone. Undoubtedly, the restrictions relating to his low back made his right upper extremity restrictions meaningless. However, the statutory language of Idaho Code § 72-332 does not limit the consideration of pre-existing impairments only to those that are rated and are industrial in nature. It includes permanent physical impairments "from any cause or origin" including those that are congenital or caused by disease or non-industrial injuries. Claimant's significant and life-long hearing loss is just such a pre-existing permanent impairment. Applying the "but for" test to the facts of this case, the Referee finds that the disability resulting from Claimant's 1999 accident combined with the effects of his significant hearing loss to render Claimant totally and permanently disabled.

In reaching this conclusion the Referee finds the vocational opinions of Barbara Nelson to be the most persuasive. Mr. Crum's conclusion that Claimant's back injury and related restrictions had little or no effect on his employability is unsupportable on the record. Dr. Collins, while fully considering the effects of the back injury and restrictions on Claimant's employability, limited her analysis of the "combined effects" to the right shoulder, ignoring Claimant's significant hearing loss entirely. Ms. Nelson consistently stated throughout her report and her deposition that Claimant's hearing deficit could not be ignored in his disability analysis.

Her opinion that, subsequent to the 1999 accident, there were some sedentary to light occupations that Claimant would have been able to do *but for* his hearing loss is supported by the record. Further, it comports with the over-arching tenet that the workers' compensation statutes are to be liberally construed as well as the more specific purposes of Idaho Code § 72-332 to encourage employers to hire individuals with manifest disabilities.

CAREY APPORTIONMENT

46. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Pre-existing Impairment

47. Right Upper Extremity. Prior to the 1999 accident, Claimant had an undisputed right upper extremity impairment rated at 4% of the whole person.

48. Hearing. Claimant's pre-existing hearing impairment was never rated as it was non-industrial. Because the hearing loss is such a significant pre-existing impairment, and is the basis for ISIF liability, some rating must be assigned to it in order to apportion liability between BAF and ISIF.

The *AMA Guides*, 5th ed., uses a mathematical approach to assessing impairment due to hearing loss. It requires calculating the decibel sum of the hearing threshold levels (DSHL) for each ear and then using a special chart to combine the values to obtain binaural hearing

impairment, which is then converted into a whole person impairment. While there is one very old audiometry test in the record, that test does not provide the information necessary to calculate Claimant's DSHL. However, there is adequate information in the record to discern that many of Claimant's activities of daily living are impacted by his hearing loss. These include difficulty with communication at home, in restaurants, and in public places. Example 11-3, p. 251 of the *AMA Guides*, 5th ed., is an example of the type of factors that support an 8% whole person impairment rating. While the Referee suspects that Claimant's hearing impairment rating might be substantially higher if calculated based on DSHL, an 8% PPI is fully supportable by the *AMA Guides*, whereas any higher rating would be pure speculation on the Commission's part.

49. Lumbar Spine. Whole person ratings for Claimant's pre-existing degenerative lumbar spine range from 21% (Dr. West) to 2% (Dr. Clark), with Dr. Knoebel coming in at 4% and Dr. Blair at 5%. If Dr. West's 15% rating for loss of range of motion is disregarded, his impairment rating of Claimant's low back is 7% whole person.[5] Averaging the lumbar impairments of the four physicians results in an impairment of 4.5% whole person impairment. All of the rating physicians agree that 75% to 80% of that lumbar impairment was pre-existing. Averaging the two apportionments results in a figure of 77.5% pre-existing and a whole person pre-existing lumbar impairment of 3.49%.

50. Combined Pre-Existing Impairment. Combining Claimant's 4% right upper extremity impairment with his 8% hearing impairment and 3.49% lumbar impairment results in a combined 15.5% whole person pre-existing impairment.

[5] The Referee agrees with Dr. Knoebel that the ROM method utilized by Dr. West in reaching his 21% rating for Claimant's lumbar spine was contrary to the *AMA Guides.* The 7% rating that Dr. West combined with the ROM impairment to determine the final PPI rating is consistent with the DRE methodology used by the other physicians in arriving at their ratings.

Impairment From Last Accident

51. Left Shoulder. Whole person impairment ratings for Claimant's left shoulder injury range from a high of 2% from Dr. West, to 1% by Dr. Clark, and 0% from Drs. Knoebel and Jones. It makes no sense that the surgical repair of Claimant's left shoulder resulted in no impairment. Claimant would have had functional limitations resulting from the repair, had they not already been subsumed by the limitations imposed as a result of the right arm injury. The Referee finds Dr. Clark's 1% rating the most reasonable on the facts, given that the injury to Claimant's left shoulder was not as extensive as his right shoulder injury and did not involve his biceps tendon.

52. Lumbar Spine. Ratings for Claimant's lumbar spine impairment following the 1999 accident were assessed at 1% by Drs. Knoebel and Blair, at 2% by Dr. Clark, and at 5.25% by Dr. West. The average of those ratings is 2.31%.

53. Combined Impairment from 1999 Accident. Combining the 2.3% impairment for Claimant's lumbar spine and his 1% impairment for his left shoulder results in a combined whole person impairment of 3%.

Calculation of Carey Apportionment

54. In *Carey v. Clearwater County Road Department*, 107 Idaho 108, 686 P.2d 54 (1984), the Idaho Court determined that in the case of ISIF liability, the non-medical factors would be prorated in proportion of the respective percentages of responsibility for the physical impairment. In this case, Claimant's total disability due to medical factors is 18.5%. Of that amount, 15.5% was pre-existing, and 3% was due to his 1999 accident. Claimant is 100% disabled, so an additional 81.5% of nonmedical factors must be apportioned between BAF and ISIF. ISIF is liable for 15.5/18.5 or 84% of the nonmedical disability and BAF is liable for

3/18.5 or 16% of the nonmedical disability.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled.

2. ISIF is liable for 84% of Claimant's permanent total disability pursuant to Idaho Code § 72-332.

3. BAF is liable for the remaining 16% of Claimant's permanent total disability.

4. BAF is responsible for the medical care that was reasonably necessary following Claimant's 1999 accident and shall compensate Claimant for any unpaid medical costs, including interest and penalties, if applicable, upon presentation of invoices and proof of payment.

5. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 5 day of April, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of April, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

PAUL T CURTIS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

djb /s/_____